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October 1, 2008

Massachusetts Department of Energy Resources
100 Cambridge Street
Boston, MA 02110

Re: **Feasibility of Compliance with RPS-related Import Provisions of the Green Communities Act, Section 105 of Chapter 169 of Acts of 2008 (the "GCA").**

Dear Sirs:

Cape Wind Associates, LLC ("CWA") hereby offers comments in response to the Department's request regarding the feasibility of compliance with two import-related provisions of Section 105 of the Green Communities Act, which establishes eligibility conditions for remotely-located generators to receive benefits (*i.e.*, renewable energy credits, or "RECs") under the Commonwealth's Renewable Portfolio Standard ("RPS") program, a state-sponsored initiative that provides incentives for investment in renewable energy resources. As set forth in detail below, an objective analysis of the legislation indicates that "feasibility" is to be given its plain and ordinary meaning of "capable of being done," and not a more expansive reading that would in effect mean "consistent with the commercial interests of remotely-located generation." Further, reference to operational realities confirms that compliance is indeed feasible, both as to commitment of capacity of external generators, and as to accounting for the netting of import and export transactions. Moreover, the RPS, as modified, is well within the bounds of state-sponsored incentive programs permitted under the Commerce Clause of the United States Constitution, and is also entirely consistent with the well-established regulatory powers of the states regarding electricity resource adequacy and planning. The Department should thus allow the provisions of Section 105 to go into effect without further delay.

I. “Feasible” Should be Interpreted in Accordance with its Plain and Ordinary Meaning, Consistent with the Legislative Process, to Mean “Capable of Being Done.”

In response to the Department’s initial question, the Department should interpret the standard of “feasibility” referenced at Section 105(g) of the Green Communities Act in accordance with its ordinary meaning of “capable of being done.” In this regard, Black’s Law Dictionary defines “feasible” as “Capable of being done, executed, affected or accomplished. Reasonable assurance of success. See possible.” Black’s then goes on, in turn, to define “possible” as “Capable of existing, happening, being, becoming or coming to pass; feasible, not contrary to the nature of things that have a necessitated nor precluded; free to happen or not; contrasted with necessary and impossible.”

The appropriateness of the foregoing ordinary meaning of “feasible” is confirmed by reference to the context of its usage within the Green Communities Act. In this regard, it is important to compare the actual statutory language of Section 105 to the far more expansive alternative provisions advanced by remotely-located commercial interests, which provisions were considered, but not included, by the Legislature. The actual statutory language of Section 105 as to feasibility states simply as follows:

(g) the department shall assess the feasibility of implementing subsections (c) and (e) and report its findings along with proposed regulations for implementing these subsections in accordance with section 12 of chapter 25A, on or before November 1, 2008.

(h) Subsections (c) and (e) shall take effect, subject to the provisions of section 12 of chapter 25A, after the report required under subsection (g) has been filed if the department has determined that it is feasible to implement these subsections.

GCA, Section 105 (g), (h). In marked contrast, however, the following alternative version promoted by remotely-located interests would have added expansive additional conditions, including far more subjective evaluations of possible impacts upon their commercial interests:

The delivery of renewable energy into the ISO-NE control area, as described in subsection (b), shall not qualify under the renewable portfolio standard, notwithstanding such delivery into the ISO-NE control area, unless the generator ... commits the renewable generating source as a committed capacity resource if and when determined feasible by the division; which determination shall include, but not be limited to, assessing capacity market access and viability using any and all contracting mechanisms including bilateral capacity contracts, forward capacity auctions, and/or capacity reconfiguration auctions, assessing the effect on viability of renewable energy generating resources, and provided further that the transmission of energy from such resource

needed for any such capacity commitment and associated import rights can be reasonably obtained and scheduled as determined by the division.

Thus, the Department should note and give deference to the fact that the Legislature considered but declined to add such provisions relating to assessments of subjective commercial interests (i.e., the commercial “viability” of imports from remote areas, or the ability of remote interests to “reasonably” schedule the requisite transmission arrangements), and resist the arguments of those who would have the Department act as if their proposed policy provisions had in fact been accepted by the Legislature.

Further, and perhaps most importantly, “feasibility” must be construed within the overall context of Section 105. The critical point is that the Legislature, by adopting the substantive text of subsection (c) and subsection (e), articulated an unequivocal policy determination that remotely-located generators should, as a condition to participating in a Commonwealth-sponsored incentive program, be required to provide a greater commitment to ensuring the reliability of the region’s electric service, as well as assure a net benefit in other program objectives. As a starting point, the Department should acknowledge such policy determination of the Legislature, and reject policy arguments that would reargue the merits of the underlying issue as if the Legislature has never considered the matter. An objective reading of Section 105 in its entirety cannot support that result. Rather, Section 105 should be read to give effect to the policy determination that participation in the Commonwealth’s RPS incentive plan should require greater local commitments and assurances from remote generators, subject only to a determination that compliance can be effected, an evaluation that should not include subjective reference to the commercial disadvantage that might result to any particular business interests.

II. Compliance with Section 105(c) is Feasible.

a. The recent Navigant report confirms that it is feasible to satisfy the renewable policy goals of the Massachusetts RPS in compliance the import-related provisions of Section 105.

The Department should reject the proposition that the import-related provisions of Section 105 would make compliance with the Commonwealth’s renewable energy requirements of the RPS program infeasible. To the contrary, the recent release of the Navigant market report commissioned by the Department and the Massachusetts Renewable Energy Trust entitled Potential for Renewable Energy Development in Massachusetts (September 2008) indicates that there would be sufficient renewable resources that are both technically and economically feasible to satisfy the full requirements of the Massachusetts RPS program without reliance upon importation of out-of-region resources, as follows:

In order to assess what additional renewable generation is feasible in Massachusetts, the Department of Energy Resources (DOER) and the Massachusetts Renewable Energy Trust (MRET) commissioned a study of in-state resources and the economics associated with their development. The study was conducted by Navigant Consulting, Inc., an

organization with substantial experience in the assessment of renewable energy across several states and over many years.

* * *

The theoretical potential for all resources is significant, with enormous amounts of offshore wind and solar PV. Somewhat more useful than the theoretical potential is the technical potential, which includes only accessible resources and provides a more realistic picture of resource potential. Wind, both on- and offshore, and solar have the largest technical potential.

A yet more useful measure of potential is the economic potential. The total economic potential in 2020 in the scenario shown in the table is a capacity of about 3500 MW and annual generation of about 10 million MWh, more than sufficient to meet our RPS requirements in 2020 at current loads. In fact, by 2012, the economic potential is already half of this amount or about 5 million MWh, with the largest early-stage potential in community scale wind and biomass. In the longer-term, offshore wind, and potentially solar, offer the largest economic potential as costs of these technologies drop below market value.

Id., at 3-4. Moreover, there are substantial additional amounts of dispatchable renewable resources in the adjacent control areas for which no feasibility concerns have been raised. There should thus be no question that the effectiveness of Section 105(c) would not adversely affect the feasibility of complying with the requirements of the Commonwealth's RPS program, and the Department's inquiry need not go any further.

b. Section 105(c) of the GCA represents the most permissive renewable program import standard of the adjacent control areas.

In any event, evaluation of the feasibility of the import-related provisions of Section 105(c) from the perspective of remotely-located generators (who are not the complying parties) must be made in context, with particular reference to the fact that such provisions represent the most permissive renewable program import standard of the adjoining control areas. This is not to suggest, however, that the publicly-initiated programs of adjacent control areas to incentivize renewable investment are unfair, inappropriate or otherwise undesirable. To the contrary, Hydro Quebec and New York have adopted programs, for their own purposes, to support and encourage renewable investment within their respective control areas. The result, however, is that each has thereby imposed impediments to participation by remotely-located projects that are far more restrictive than those set forth within Section 105(c) the GCA, and their claims as to unfair or unduly burdensome treatment should be evaluated and analyzed accordingly.

With respect to Hydro Quebec, the conditions for program eligibility under Section 105(c) are far more liberal than those applicable under Quebec's wind development initiative. For example, the Department should take particular notice of the Call for Tenders issued by Hydro-Quebec Distribution on May 12, 2003, for a total of 1,000 megawatts of wind-generated installed electrical capacity. (Notably, the issuer's affiliate has participated in these proceedings and was among the most vocal opponents of the delivery requirement of Section 105(c) during

the legislative process, such that the HQ control area's own policies are properly considered in evaluating claims of unfair or overly burdensome treatment.) Most importantly, the HQ Call for Offers makes it clear that all 1,000 megawatts of wind capacity must be physically located within Quebec, with no allowance for any import of externally generated renewable energy, even if all energy and capacity were actually delivered into Quebec. Indeed, said Call specifies that, to be eligible, a wind farm must be "connected to Hydro-Quebec's integrated network at a single delivery point located in the eligible region." Id. at 7. Moreover, the Call also requires that each project must meet "regional content" requirements as to expenditures and capital investments that must be made within Quebec, as follows:

The nacelles shall originate from assembly facilities located in the eligible region [within Quebec]. In addition, to be eligible for the call for tenders, each wind farm project must be associated with expenses and investments in the eligible region [within Quebec] corresponding to [at least] forty percent of the project's total costs. . . .

Id. at 1. Thus, when the complaints of Hydro Quebec are reviewed in context, the eligibility conditions of Section 105 (c) are by no means burdensome. Nor, again, do we imply that the Hydro-Quebec's approach is necessarily wrong; it simply reflects that region's objective of assuring that its ratepayers, who will pay the premium, will in fact realize the economic and reliability benefits of the renewable energy.

The attached brochure published by the Province of Quebec similarly confirms the intent to prohibit the eligibility of imported renewable energy in Quebec's renewable initiative. In such publication, Using Energy to Build the Quebec of Tomorrow, the Province clearly states its objective to use its renewable initiative as a means of local economic development: "We must make better use of energy as a lever for economic development," and further explains that the goal of the initiative is to develop Quebec's own wind resources, in a manner that mandates program participants to make capital and manufacturing investments in Quebec, noting that "the requests for proposals generate investments of \$4.9 billion. They include requirements concerning Quebec content (60%), with a special focus on the Gaspesie-lles-de-la-Madeleine region and the Matane MRC," with forthcoming initiatives to generate further capital investments within Quebec ("The requests for proposals will generate investments of \$700 to \$750 million.") Id. at 9, 10-11. Further, an HQ release entitled Overview of Canadian Environmental Credits similarly confirms that its wind initiative is designed to encourage in-region investment and, importantly, to meet and enhance reliability of electrical service to its native in-region customers:

With regards to other mechanisms put in place by the Government of Canada, the Wind Power Production Initiative (WPPI) is designed specifically to encourage Canadian companies to build new wind farms as an incentive for industrial development to meet Canada's growing needs for energy. The WPPI takes into account both economic and environmental benefits.

Id. Thus, Hydro Quebec and its affiliates are in no position to make a credible argument that the far more permissive conditions of Section 105(c) to participation in the wind initiative of the Commonwealth are somehow unfair or unduly burdensome.

Similar reference can be made to the state-initiated renewable program in the adjoining control area of NY-ISO. Again, the adjacent control area has a state-sponsored renewable incentive program that places a far more restrictive condition upon participation by external resources than that of Section 105(c). As indicated below, the New York Public Service Commission in its Order Authorizing Solicitation Methods in Consideration of Bid Evaluation Criteria in Denying Request for Clarification (O3-E-O188, October 19, 2006) established conditions to New York's initiative intended to encourage renewable energy development through a central procurement mechanism that, by design, effectively preclude participation by outside resources:

Providing economic benefits to New York State was one of the formal objectives adopted when we established the RPS Program in September 2004. We agree with the Commenting Parties addressing this issue that because New York ratepayers are funding the RPS Program, the impacts of projects on economic development in New York localities that host a renewable energy facility should be considered in the bid evaluation process.

Many commentators assert that fully one-half of the value of bids should be subject to the economic benefits analysis. This appears to give too much weight to this factor, which is, after all, only one among several goals of the RPS Program. To account for a reasonable and equitable acknowledgement of the potential economic benefits created by projects, while continuing to minimize the cost of the RPS Program, the economic benefits category should be weighted at no more than 30 percent of the total score in the evaluation and selection of proposals.

This percentage results from a balancing of evaluation factors relating to program costs and desirability of weighing the need for participation by interstate energy producers against the economic development benefits in the State derived from in-state renewable facilities.

Id. at 15-17. Thus, New York's state-sponsored renewable initiative, by placing 30% weighting in favor of in-state facilities in light of economic development benefits, effectively precludes out-of-state projects from successful participation in the state-sponsored central procurement initiative. Accordingly, New York interests can also hardly complain that the less stringent requirements of the Massachusetts initiative under Section 105 are somehow unduly burdensome or unfair.

c. The applicable ISO-NE market rules allow and provide the mechanisms for compliance by remotely-located generators with the requirements of Section 105 (c).

The provisions of Market Rule No. 1 of ISO-NE expressly provide for the participation, by way of import, of remotely-located generation units in the capacity markets of NEPOOL. Section III.8.3.7.1 (General Requirements) of ISO-NE's Market Rule 1 provides the process whereby capacity imports may participate in the market, including provisions as to registration of the importer and the specific external resource, as well as requirements on submitting supply offers into the energy market. Section III.8.3.7.2 (Import Contract Performance) further explains the commitment of the importing party to offer and supply energy to the ISO-NE control area, including the requirement for self-scheduled energy backed by an external resource to schedule a minimum of 16 on-peak hours during the weekdays that are not holidays. Thus, the essential obligation of external capacity resources is simply to offer energy into the day-ahead market of the ISO-NE control area, and to deliver such amounts of energy, either from the designated unit or from any other sources. Most importantly, ISO-NE treats such import schedules on a "unit-blind" basis, leaving the importer to make energy deliveries from the sources of its choice, with the ability to thereby avoid adverse impacts to the extent that any particular unit does not perform as expected. We further understand that ISO-NE would calculate any measures relating to Poorly Performing Resources (*i.e.*, Market Rule 1, Section III.13.7.1.2) solely on the basis of delivered transaction energy, and irrespective of the actual performance or availability of the specific external unit, such that the concern over potential disqualification of intermittent units from the FCM on the basis of actual availability factors is misplaced.

The feasibility of compliance with such provisions is further demonstrated by the announced intention of owners of external intermittent resources to participate in the ISO-NE forward capacity auctions, and thus its day-ahead energy markets. In this regard, the Informational Filing by ISO-NE to the FERC dated September 9, 2008, respecting the upcoming Forward Capacity Auction indicates that Canadian wind projects have in fact made submissions and have been qualified to enter into the upcoming Forward Capacity Auction ("FCA"), specifically including, as "New Imports," the Caribou Wind Park and West Cape Wind Farm. It defies credibility for the Canadian owners of such intermittent projects to actively announce and pursue their intent to participate in the upcoming FCA, while at the same time arguing to the Department that such participation is prohibitively "not feasible."

Moreover, it is particularly telling that the representative of TransCanada at last week's hearing confirmed that his company intends to offer the energy from its internal intermittent project into the day-ahead market, where prices are often substantially higher than in the real-time market. As he explained, his company is fully willing and able to comply with the requirements of the day-ahead market through careful asset and resource management, in the very same manner that an external resource would participate in the day-ahead market. The record thus does not support the suggestion that participation of such units in the day-ahead market is physically or economically prohibitive, much less not "feasible."

III. The RPS Eligibility Provisions of Section 105(c) Would Not Violate the Commerce Clause.

a. Introduction

As set forth below, Section 105(c) would not violate the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3) or otherwise place any impermissible burdens upon interstate commerce.¹ Most importantly, such provisions only set the terms of participation in a state-sponsored incentive program (*i.e.*, eligibility to receive Massachusetts RECs), but do not impose any adverse prohibition or burden upon the import or trade of externally generated renewable power within Massachusetts, which could continue unfettered by any implications of the Massachusetts RPS initiative. Further, Section 105(c) makes absolutely no distinction as to program eligibility on the basis of in-state versus out-of-state production.² These distinctions set such program apart from more troublesome precedents that involved prohibitions, restrictions or differential taxation burdens upon import, in a manner that improperly impeded or frustrated external commerce.

b. State-sponsored incentive programs for more restrictive than Section 105(c) have been found not to violate the Commerce Clause.

With respect to the permissible scope of eligibility for state-approved incentive programs, the Department should reference the leading case in this Circuit, Grant's Dairy-Maine, LLC, v. Comm. of Maine Dept. of Agr., Food & Rural Resources, 232 F.3d 8 (1st Cir. 2000), wherein the Court rejected claims that a state-initiated program of Maine establishing price floors for in-state sales of domestically produced milk (but not for sales of imported milk) constituted an impermissible and discriminatory burden upon interstate commerce. In distinguishing such a

¹ The Department should nonetheless carefully consider whether it should venture into the judicial function, as requested, of attempting to determine the facial Constitutionality of a statute adopted by the Legislature. See, e.g., Maher v. Justices of Quincy Div. of District Court, 67 Mass. App.Ct. 612, 618 (2006):

The board clearly had no jurisdiction to decide the constitutionality of the forfeiture provision as applied to the plaintiff. *See ibid.*, 2 Pierce, Administrative Law § 15.5, at 1004 (4th ed. 2002) (“agencies lack the power to hold statutory provision unconstitutional”). It is for the courts, not administrative agencies, to decide the constitutionality of statutes. Moreover, the determination of the constitutionality of a statute as applied can be one of the most difficult and sensitive tasks performed by the judiciary.

Id. The Department should also consider that such a determination could have far-reaching implications for other state-sponsored initiatives with comparable or more narrow geographic limitations, including most state RPS programs, as well as the Regional Greenhouse Gas Initiative. CWA thus urges the Department to limit its consideration to the practical feasibility of Section 105, a matter well within expertise.

² For similar reasons, such provisions would also fully comply with the provisions of NAFTA. Even if electricity and/or RECs were deemed to be “goods” with the meaning of Article VI of NAFTA, Section 105 would afford foreign energy the very same “national treatment” as afforded to the “like product” of American energy imported into the control area, without any distinction as to national origin.

locally-defined benefit program from the type of discriminatory burdens that were disallowed by the Supreme Court in West Lynn Creamery, Inc., 512 U.S. 186 (1994), the court concluded that the state-initiated program that afforded affirmative benefits targeted solely at assisting local producers neither erected impermissible barriers to access, nor inhibited interstate commerce in any impermissible way, as follows:

The [U.S. Supreme] Court concluded that the minimum price [applicable to locally produced products only] did not create a barrier to interstate commerce because the state did not “essay to regulate or to restrain the shipment of the respondent’s milk into New York or to regulate its sale or price at which respondent may sell it in New York.” [Milk Control Bd. v. Eisenberg Farm Prods., 306 U.S. 346, 352] The case before us fits comfortably within this mold: Maine imposes no restriction on the sale of milk out-of-state and does not attempt to regulate the price at which Maine-produced milk is sold in other venues.

Id. at 22. Thus, the court held that limiting the economic benefit of state-initiated programs to local production was not deemed to place any impermissible impediment or burden upon interstate commerce. It is also well-settled that “[d]irect subsidization of domestic industry does not ordinarily run afoul of the negative Commerce Clause.” West Lynn, supra at 199.

The Department should also reference the case of Hughes v. the Alexandria Scrap Corp., 426 U.S. 794 (1976), where the Supreme Court upheld a Maryland state-sponsored incentive program that paid a “bounty” for destruction, within Maryland, of automobile hulks that had been registered within Maryland, but not those that were registered in or imported from other states or destroyed in out-of-state facilities. In rejecting the argument that the in-state “bounty” program would unduly disadvantage out-of-state processors (i.e., the argument that “to avoid the disadvantage those [out-of-state] processors would have to build new plants inside Maryland to carry on a business, which prior to the amendment, they had pursued efficiently outside the state”), the court held that the state-sponsored incentive program did not raise the types of burdens upon interstate commerce that are prohibited by the Commerce Clause:

But no trade barrier of the type forbidden by the Commerce Clause, involved in the previous cases, impedes their [the affected hulks’] movement out of state. They remained within Maryland in response to market forces, including that exerted by the money from the state. Nothing in this purpose of examining the Commerce Clause forbids the state, in the absence of congressional action, from participating in the market and exercising the right to favor its own citizens over others.

Id. at 807, 809-810.

In a public paper prepared in 2001 in connection with the original structuring of the RPS, including the establishment of geographic eligibility standards thereunder, Massachusetts Portfolio Standard Options: Legal and Policy Analysis, Professor Stephen Ferrey of Suffolk University Law School similarly concluded that even limiting eligibility for RECs under a state-

sponsored RPS incentive program to only those projects located with the Commonwealth would not unduly burden interstate commerce:

The portfolio standards (but not the trust funds) qualify as state market participation. Therefore, they qualify under the market participation exception to Commerce Clause limitations. The market participant exception is applied by the Court where the state owns the resource, entitlement, preference, or article in commerce, or creates such commerce entirely by state tax expenditure or subsidy.

The situation with the Massachusetts portfolio standards is quite similar to the situation in the *Hughes* decision of the U.S. Supreme Court, which is the quintessential touchstone of market participation which is allowed to discriminate based on in-state preferences. In *Hughes*, the state of Maryland decided to create bounties for the retirement of inoperable car hulks. These bounties are similar to the portfolio rights that Massachusetts has created. The state of Maryland elected to grant a preference to in-state scrap metal processors, in receiving bounties. An out-of-state processor claimed that the preference for Maryland processors violated the dormant commerce clause, by making it more difficult, but not impossible, for the out-of-state processor to do business in Maryland.

A portfolio standard requiring the renewable resource to be located in Massachusetts, would make it more difficult, but not impossible, for an out-of-state retailer to enter the power business in Massachusetts. An out-of-state power vendor could either (1) acquire a share in the power output of in-state renewable energy resources, or (2) acquire a credit evidencing the power output that originated from a Massachusetts renewable project. The Court in *Hughes* held that where the state creates the bounty (or renewable portfolio certification), the state can choose to place the certificate creation into interstate commerce or withhold it, without violating the Commerce Clause. Therefore, Massachusetts can elect to create verifiable credits to satisfy the portfolio standard from those renewable resources only within Massachusetts, or from a wider geographic area.

Id. at 12-13 (emphasis added.)

In light of the foregoing, it is further compelling that the state-sponsored RPS program, as amended per Section 105(c), would award Massachusetts RECs not just to in-state projects, but also to any projects located within, or committing their capacity to, the NEPOOL control area, without geographic reference to any state borders. Under the foregoing authorities, such a distinction would present an even more clear case of conformity with the Commerce Clause.³ The scope of geographical eligibility would be a six-state control area defined not by parochial

³ While one commenter at the public session referenced a published student note that offered a contrary opinion, it is notable that the law student in such note cited no case authority for such proposition.

interests or even by any politically-determined boundaries, but by the physical and engineering limitations of NEPOOL as a tight power pool, as long recognized by FERC precedent. Section 105(c) thereby makes absolutely no distinction on the basis of in-state versus out-of-state generation, and we are aware of no case invalidating a state-sponsored program implemented within such a pre-existing reliability zone defined by engineering parameters rather than political borders.

c. Section 105(c) properly advances legitimate and non-protectionist state interest.

Those interests that had lobbied the Legislature against the adoption of Section 105(c), and that now would have the Department deem it unconstitutional, ignore the critical fact that such provision furthers important and non-protectionists interests that are within the regulatory role traditionally reserved to the states. Most importantly, the eligibility provision that external generators commit their capacity to this control area is in direct response to reliability concerns raised by ISO-NE as to the region's over-reliance upon natural gas, a situation that has serious implications for reliability, particularly during winter peak periods. ISO-NE's Regional System Plan ("RSP") of 2005 confirmed this reliability risk and expressly identified the development of renewable resources as an important corrective measure:

Approximately two-thirds of New England's supply portfolio depends on natural gas and oil for its primary fuel. These fuels have a high price volatility, and their availability is increasingly dependent on imports. This reliance on gas and oil place New England's electricity supply at risk. As discussed later in this chapter, the viable alternative sources are limited, and the ISO's believes New England should more aggressively pursue energy conservation, demand response and the development of renewable energy resources.

RSP 2005 at 67. The RSP report goes on to conclude that "the ISO supports a much more aggressive pursuit of alternative fuel sources as a means of diversifying the region's fuel supply and reducing the price risks in the future." *Id.* at 114. More recently, ISO's RSP 2006 reiterated the reliability concern, with specific reference to winter peak reliability, concluding that "Regional gas pipeline capacity is not sufficient to serve the coincident demand for natural gas during winter-peak load periods from the core natural gas and electricity generating in sectors," and that "these factors keep fuel-supply and diversity concerns in the forefront of regional discussion." RSP 2006 at 54. The report goes on as follows:

RSP 06 also emphasizes the critical importance of modifying the resources next to New England to reduce the region's headed dependence on generation fuel by natural gas and oil. ... Thus, the long term, the region must continue to decrease its reliance on natural gas, particularly winter-peak loads conditions.

Id. at 3. Thus, there should be no question that the provisions of Section 105(c) address a serious, independently verified and non-protectionist objective of responding to a reliability threat to the region's electrical service. Further, in the absence of such a provision, external renewable generators could be heavily supported by Massachusetts ratepayers through the RPS, but have absolutely no commitment (and thus provide no assured reliability benefit) to ISO-NE when needed most, including on those winter peak days identified by ISO-NE, when wind projects are often producing at their highest output.

It must also be recognized that the assurance of resource adequacy is part of the traditional regulatory authority entrusted to the states, and not to the federal government, as recently confirmed by the Federal Energy Regulatory Commission in an order specifically addressing the capacity markets of ISO-NE, as follows:

Resource adequacy is a matter that has traditionally rested with the states and is to continue to rest there. States have traditionally designated the entities that are adequate for procuring adequate capacity to serve loads within the respected jurisdictions. ... In response to the question post by the Maine PUC, we will not at this time restrict the options that a state may consider to ensure resource adequacy proposed within its states, other than to require that the cost of the options not be imposed involuntary on entities in other states.

Devon Power et al., Order on Rehearing and Clarification, Docket No. ER03-563-038 (2004), p. 22 (emphasis added). Further, Massachusetts has historically reviewed and regulated the means by which the state's electrical needs will be met, including, for example, Integrated Resource Planning ("IRP") initiatives and the review of long-range electric forecasts and supply plans under M.G.L. c. 164, §69I. Thus, Section 105(c) is readily distinguished from more troublesome cases under the Commerce Clause, in that Massachusetts has thereby responded directly to a serious reliability threat identified by the independent system operator, a matter wholly unrelated to economic protectionism and in an area traditionally reserved to state regulation, as recently acknowledge by the agency exercising corresponding federal authority.

d. The Department may implement Section 105(c) through regulations that minimize potential concerns.

While Section 105(c), as discussed above, does not impermissibly burden interstate commerce, the Department could nonetheless implement such provisions through regulations carefully crafted so as to effectuate the legislative intent, but also to avoid the concerns that have been raised by remotely-located generating interests. The Department could do so by reading the relevant provision of Section 105(c) that a generator "commit the renewable generating resource as a committed capacity resource," as not necessarily intending that those terms would have the same meaning as the corresponding defined terms of the ISO-NE market rules. Rather, the interpretative approach would focus upon the policy determination (again, as discussed above) that remotely-located units should commit to supply their energy to this control area at critical times when needed to assure system reliability. Most importantly, such a commitment would not

necessarily include the full array of obligations of “Import Capacity Resources” as defined by the ISO-NE’s market rules. One possible manner of affecting such a result would be to adopt a regulation such as the following:

In order for any renewable energy generator to qualify under the renewable portfolio standard, the generator must agree and certify to the DOER that, for the applicable capacity year, (i) in the event of a forecasted shortage event in the ISO-NE control area, it will upon request offer its energy to serve the ISO-NE control area, and (ii) it will not commit the unit’s capacity to any control area to other than ISO-NE. Failure to comply with such requirement would result in a loss of renewable portfolio standard eligibility for a twelve month period. The foregoing provision shall not apply to import transactions pursuant to bilateral contracts entered into prior to the effective date of the Act Relative to Green Communities of 2008

Under the foregoing approach, which could be applicable to both internal and external generators, the capacity-related commitment would be to provide all of the generator’s energy to this control area in times of shortage, and to not make a contrary commitment to any other control area. There would thus be no argument as to unequal treatment or fairness, and all participating units would need to make the same election as to foregoing conflicting commitments to other control areas. Notably, such approach would also not require the obligations identified by external generators as the most troublesome aspects of “Capacity Resource” status under the ISO-NE rules (*i.e.*, the general obligation to bid day-ahead, the resulting exposure to potential penalties, and potential loss of capacity status due to poor availability). The approach would also redress the feasibility concern voiced over application to pre-enactment bilateral contracts.

Perhaps most importantly, such an approach would fulfill the plain and basic intent of the legislature to assure a greater reliability-related commitment from remotely-located projects that seek to receive incentives through the Massachusetts RPS. Under this approach, any external parties would be hard pressed to argue that a simple agreement to provide energy when needed and called upon is somehow an unduly burdensome condition to participation in a Massachusetts program supported by Massachusetts ratepayers.

IV. Compliance With The Netting Provisions of Section 105(e) if Feasible.

The Department should also reach the determination that implementation of the netting provisions of Section 105(e) is feasible. And, notwithstanding pleadings to the contrary, the Department should do so without revisiting the underlying policy issue or questioning the substantive determination of the Legislature that such provisions address a serious potential exposure that needs to be remedied. The industry has experienced illusory trade practices in the past, including the well-documented “wash,” “round-trip” and “back-to-back” transactions brought to light after the California energy crisis, the potential for which provided ample justification for the current legislative remedy. The Department should also disregard arguments that, to date, we have not seen documentation that would confirm the extent to which such trade

practices have occurred within this control area. Such an argument disregards the fact that, prior to the implementation of Section 105(e), there has been no mechanism to regulate or publicly track such occurrences, a situation that the legislation is designed to correct.

The Department should thus proceed to implement Section 105(e) in a manner that addresses the concerns identified by the Legislature. For example, the rule should be applied to assure the legislatively articulated objective of assuring that those parties receiving the benefits of the Massachusetts RPS program do in fact cause a net increase in the amount of renewable energy consumed within this control area. As for the relevant period of such netting, we believe that a 24-hour dispatch day would provide both a meaningful and feasible window. Under such a rule, for example, a party seeking RPS revenues would need to attest that the renewable amounts imported for its account were not offset by exports from the ISO-NE control area.

It is important to note in this regard that the netting would also include exports by “affiliates,” a well-established concept already in use in the wholesale markets. We would suggest that the Department simply incorporate the definition of “related person” from the Second Restated NEPOOL Agreement, a term which already has well-established and clear meaning in this context. Section 105(e) also requires the netting of exports effected by the claimant’s contracted agent, i.e., “any other person under contract with such person to export energy from the ISO-NE control area and to deliver such energy directly or indirectly to such person.” Contrary to comments made at hearing, such provision is thus both limited and perfectly clear; it would include only exports made by any such contracted parties on behalf of and delivered to the party claiming the import credit. Thus, rather than being prohibitively inclusive or vague, the provision in fact includes only export trades for the account of the importer, of which it would no doubt be aware and able to track.

We are further advised that the process of producing documentation of offsetting trades from existing NEPOOL certification systems (i.e., the NEPOOL GIS System) is a largely mechanical function, with additional judgment only arising with respect to identifying the relevant parties, an issue that could be clarified through regulation. To the extent, however, that there are concerns as to compliance burdens, the Department could effect implementation through self-certification. For example, the claimant could quarterly certify to the Department that the amounts of RECs claimed in any dispatch day have been netted for any amounts exported for the claimant’s account, as discussed above. The Department could then have regulatory access to records to confirm such a certification as it deems it necessary, with appropriate provisions for confidentiality. Such an approach would involve little or no costs until such time as there were cause, in the discretion of the Department, to pursue regulatory inquiry.

In conclusion, the Department could readily implement Section 105(e) in a manner that is both feasible and of little cost. Once again, it is apparent that the real objection of the protesting parties is not one of feasibility, but of substantive objection to the policy determination of the Legislature. Any legitimate concerns as to regulatory burden can be addressed through regulatory definitions focusing narrowly upon exports made on behalf of the party claiming the REC credit, and by quarterly self-certification involving little or no implementation costs. The Department should thus allow the provisions to go into effect to remedy the concerns identified by the Legislature.

V. Conclusion.

For the foregoing reasons, the Department should determine that compliance with Section 106 is feasible in all respects and allow such provision to go into effect as soon as possible.

Sincerely,



Dennis J. Duffy
Vice President – Regulatory Affairs